No. 95-292

Supreme Court, U.S.
FILED
SEP 18 1995
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JOHN DIBIASE,
Petitioner,

v.

SMITHKLINE BEECHAM CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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September 18, 1995

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QUESTIONS PRESENTED *

1. Did the Court of Appeals err by holding that, where an employer acted pursuant to a facially neutral policy, an employee who claimed disparate treatment on account of age, needed to adduce evidence that the employer *intended* to discriminate on the basis of age?

2. Did the Court of Appeals err by holding that discriminatory intent was *not* shown by the fact that an employer offered an older employee the same severance benefit options offered to all other employees, regardless of age, after the employer was told that the older employee believed such treatment was discriminatory?

3. Did the Court of Appeals err by finding no age discrimination where an employer offered an older employee, upon his termination, the option of receiving enhanced severance benefits in exchange for a general release of all claims against the employer and, in doing so, the employer acted pursuant to a policy under which the same option was offered to every terminated employee, regardless of age?

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* Respondent offers these three questions as proper formulations of the issues raised in the Petition for a Writ of Certiorari ("Petition" or "Pet."). As explained in the Argument section of this Brief, however, Respondent believes that the first question is not appropriate for this Court's review because it was not argued below. *See* p. 8 *infra*.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are identified in the caption.

STATEMENT PURSUANT TO RULE 29.1

Respondent SmithKline Beecham Corporation ("SKB") is a Pennsylvania corporation. SKB's parent is SmithKline Beecham PLC (UK). SKB's subsidiaries (excluding those wholly owned by SKB) are: Beecham Group, P.L.C.; Beecham Pakistan (Private) Limited; Beecham Pharmaceuticals (PTE) Limited; Beecham Portuguesa Produtos Farmaceuticos E Quimicos LTDA; Beecham Yakuhin K.K.; Beecham-FSM Limited; Beeger Investments (PTY) Limited; Beelsa Investments (PTY) Limited; Beeyar Investments (PTY) Limited; Cainta Realty Corporation; Eskay, S.p.A.; Fournex S.A.; Group Laboratories South Africa (Proprietary) Limited; Hill & Murray Limited; Instituto Luso Farmaco S.A.; Macleans Limited; Masenco S.A. De C.V.; Mayfynn (Proprietary) Limited; Medisana Pharmazeutische U. Drogen-Handel GES.M.B.H.; P.T. Smithkline Beecham Pharmaceuticals; Paola Cocco, LDA; Produtos Beecham-Cosmeticos E Alimentacao LTDA; Publimark Publicidade E Marketing LTDA; S.R. One International B.V.; Sark S.p.A.; Smith Kline & French (N.Z.) Limited; Smith Kline & French B.V.; Smith Kline & French Laboratories Limited; Smith Kline & French of Pakistan Limited; Smith Kline & French Pension Trustees Limited; Smith Kline & French Protugesa Produtos Farmaceuticos LDA; Smith Kline & French, S.p.A.; Smithkline Beecham (Manufacturing) Limited; Smithkline Beecham (NZ) Limited; Smithkline Beecham A.B.; Smithkline Beecham A/S; Smithkline Beecham AG; Smithkline Beecham C.I.S.A.; Smithkline Beecham Consumer Brands A.B.; Smithkline Beecham Consumer Brands B.V.; Smithkline Beecham Consumer Healthcare (PTY) Limited; Smithkline Beecham Consumer Healthcare (Venezuela) S.A.; Smithkline Beecham Consumer Healthcare

Limited; Smithkline Beecham Consumer Healthcare PTE, Ltd.; Smithkline Beecham Consumer Healthcare Sendirian Berhad; Smithkline Beecham de Chile, S.A.; Smithkline Beecham de Venezuela C.A.; Smithkline Beecham Far East B.V.; Smithkline Beecham Farmaceutica S.A. de C.V.; Smithkline Beecham Farmaceutici S.p.A.; Smithkline Beecham Guatemala Limitada; Smithkline Beecham Inc.; Smithkline Beecham Laboratoires Pharmaceutiques SA; Smithkline Beecham Laboratories (Australia) Limited; Smithkline Beecham Markenartikel GMBH & Co. O.H.G.; Smithkline Beecham Markenartinel GMBH; Smithkline Beecham Nigeria PLC, Smithkline Beecham Overseas (No. 2) Limited; Smithkline Beecham Pharma Ges, M.B.H.; Smithkline Beecham Pharma Inc.; Smithkline Beecham Pharma S.A.; Smithkline Beecham Pharmaceuticals (PTY) Limited; Smithkline Beecham Pharmaceuticals A.B.; Smithkline Beecham Quimica Do Nordeste Ltda; Smithkline Beecham Quimica S.A., de C.V.; Smithkline Beecham S.A.; Smithkline Beecham Sante Animale S.A.; Smithkline Beecham Santa Grand Public S.A.; Smithkline Beecham Seiyaku K.K.; Smithkline Beecham-B Limited; Smithkline Bottling Company (PTY) Limited; W. Jordan Brushware (Proprietary) Limited; XIXIA Pharmaceuticals (Proprietary) Limited.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

An accurate statement of the facts of this case appears in the opinion of the Court of Appeals. *See* 48 F.3d at 722-24. A brief summary follows:

In early 1992, as part of a reduction in its workforce, SmithKline Beecham Corporation ("SKB") terminated John DiBiase's employment as a shift supervisor in the data processing department of its facility in King of Prussia, Pennsylvania. DiBiase was then 51 years old. *See id.* at 722.

At the time of DiBiase's termination, SKB had in effect a severance policy, which provided terminated employees with cash payments and continuation of their medical and dental insurance coverage. The policy entitled every terminated employee—without regard to age, race, sex or any other factor—to choose one of two options: a lump

sum cash payment equal to twelve months' salary and a three-month continuation of insurance coverage (the "Basic Benefits Package"); or a lump sum cash payment equal to fifteen months' salary and a six-month continuation of insurance coverage (the "Enhanced Benefits Package"). *See id.*

To receive the Basic Benefits Package, an employee needed do no more than select that option. To receive the Enhanced Benefits Package, an employee was required to execute a standard form, stating that the employee thereby agreed to

> release, waive and forever discharge SmithKline Beecham Corporation . . . from any and all claims, agreements, causes of action, demands or liabilities of any nature whatsoever . . . arising, occurring or existing at any time prior to the signing of this General Release, whether known or unknown.

The general release expressly applied to all claims under federal employment discrimination laws, including the ADEA. *See id.*

SKB's policy did not allow for a terminated employee to receive the Enhanced Benefits Package in exchange for a release of *some*, but not all, claims. Nor did the policy provide a graduated schedule of enhanced benefits according to the nature, number or magnitude of the claims that a terminated employee might have and be willing to waive; it made no attempt to assign any particular values to particular types of claims, *e.g.*, 100x for a race discrimination claim, 150x for an ERISA claim, 175x for an OSHA claim. Rather, identifying the value of any particular employee's claims was left to that employee, who could choose whether it was in his or her interest to waive the claims in exchange for the incremental benefits contained in the Enhanced Severance Package. *See id.*

Consistent with its policy, SKB offered DiBiase, upon his termination, a choice between the Basic Benefits Package and the Enhanced Benefits Package. However, DiBiase

wanted *both* to receive the Enhanced Benefits Package *and* to sue SKB on the theory that it had terminated him because of his age. He proposed, therefore, that SKB give him the enhancement in exchange for only a *partial* release of claims. SKB refused DiBiase's request and he chose the Basic Benefits Package. *See id.* at 722-23.

DiBiase then filed his wrongful termination claim. The District Court concluded that the claim lacked even the minimum factual evidence to go before a jury and awarded SKB summary judgment. *See id.* at 723.

DiBiase also sued SKB on the ground that its policy of requiring all terminated employees to release all claims in order to receive the Enhanced Benefits Package unlawfully discriminated against older workers. His theory was that, since only persons over 40 years of age ("older workers") could have—and therefore, give up—ADEA claims, older workers had to give up more than younger workers to receive the Enhanced Benefits Package.* The District Court awarded DiBiase summary judgment on that claim, finding that SKB's policy was *facially* discriminatory. *See id.* at 723-24.

The Third Circuit reversed, finding that (1) there was no facial discrimination because the policy, on its face, treated everyone identically, *i.e.*, each employee who chose the Enhanced Benefits Package was required to give up *all* claims; and (2) that there was no *non*facial discrimination because (a) there was no adverse treatment and (b) there was no evidence of any intent to discriminate. *See id.* at 726-30.

The fundamental error identified by the Court of Appeals in the position of DiBiase and the District Court was their failure to recognize that the general release did not waive abstract *rights*, but rather accrued *claims*. Since not every worker protected by the ADEA has an accrued ADEA claim, and not every accrued ADEA claim is more

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* DiBiase chose to pursue his claim exclusively under the "disparate treatment" theory and made no attempt to make out a case of "disparate impact". *See* 43 F.3d at 730-31.

valuable than other claims, it is wrong to say, as DiBiase and the District Court did, that older workers necessarily must give up more than younger workers in order to receive the Enhanced Benefits Package. The value of any particular worker's general release depends upon his or her particular experiences as an employee at SKB and not upon whether he or she is protected by a greater number of statutes. Indeed, as the District Court's dismissal of DiBiase's wrongful termination claim demonstrates, although DiBiase had ADEA *rights*, he did not have an ADEA *claim*. Once the erroneous conflation of rights and claims is removed, it becomes readily apparent that the SKB policy did not subject either DiBiase in particular, or older workers in general, to any adverse treatment on account of age. *See id.* at 729-30.

SUMMARY OF ARGUMENT

1. This Court should not grant *certiorari* in this case because it is not a sufficiently important case to warrant such attention. Neither this Court nor any other Court of Appeals has passed on the precise issue presented, whether an employer violates the ADEA by offering every terminated employee enhanced severance benefits in exchange for a general release of all claims. Therefore, there is no direct conflict between the opinion below and this Court and no split among the circuits. Nor is there any prospect of grave harm by leaving the decision below unreviewed; employees will simply continue to be given an opportunity to decide for themselves whether receiving enhanced benefits in exchange for waiving all accrued claims is in their best interests. Finally, this case revolves, in large part, around the particularities of DiBiase's own experiences at SKB, *e.g.*, the significance of his expressing to SKB his opinion that its policy was discriminatory. A decision by this Court on the merits, therefore, might have very little general applicability.

2. DiBiase's claims that the Court of Appeals erred on particular legal matters are without merit. His position that the court below should have read *UAW v. Johnson Controls, Inc.*, 449 U.S. 111 (1985), as eliminating the

need for DiBiase to prove discriminatory intent on the part of SKB is wrong. The Court of Appeals correctly interpreted *Johnson Controls* to say that independent evidence of discriminatory intent is unnecessary where adverse treatment occurs pursuant to a policy that *explicitly* discriminates on the basis of a protected trait; the Court of Appeals also correctly found that, because SKB's policy was *not* explicitly discriminatory, DiBiase had to produce evidence of SKB's intent to discriminate against him because of his age.

Similarly, contrary to DiBiase's position, the Court of Appeals did not contradict *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978), by holding that SKB did not engage in age discrimination against DiBiase. The policy at issue in *Manhart* was the polar opposite of the SKB policy at issue here. In *Manhart*, the explicit terms of the policy classified employees according to gender and mandated adverse treatment, in the form of higher pension contributions, for women; in this case, the SKB policy makes *no* classification of employees and mandates the *same* treatment, a choice between Basic and Enhanced Benefits Packages, for all. Clearly, the Court of Appeals was right not to treat *Manhart* as requiring that the SKB policy be held to be discriminatory.

Finally, DiBiase's argument that recent amendments to the ADEA require employers to pay older employees who waive all their claims more than they pay younger employees who waive all their claims has no support in the statutory language. In fact, the legislative history shows that Congress considered and rejected the rule DiBiase proposes.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT WARRANT A DECISION ON THE MERITS BY THIS COURT.

This case does not present any issue that makes it necessary, wise or efficient for this Court to devote its resources to a consideration of the individual merits of

DiBiase's claim. First of all, the basic issue—whether the ADEA proscribes employers from offering all their employees, equally, enhanced severance benefits in exchange for a general release—has not been ruled upon by this Court. Thus, there is no possibility that the decision below is in direct conflict with this Court's prior holdings. Second, the decision below is the only decision on the issue by any Court of Appeals. Thus, there is no split among the circuits requiring this Court's resolution.

Third, there is no grave potential harm from not having a Supreme Court decision on the issue. Employees simply will continue to be provided with a severance benefit option that they can freely accept or reject according to their own appraisals of their own individual circumstances. If they decide that the value of their accrued claims, if any, is less than that of the enhancement, they can choose to benefit themselves by opting for the enhancement; if they decide that the value of their accrued claims is higher than that of the enhancement, they can benefit themselves by foregoing the enhancement and suing on their claims.

Fourth, a decision by this Court on the merits of this case might well have only a very limited impact. This case revolves around the particularities of DiBiase's own factual circumstances. For example, whether DiBiase's comment to SKB that he thought its policy was discriminatory serves as evidence of intent to discriminate on the part of SKB is a fact-bound question that would not likely have any broad application to ADEA cases generally.

In sum, this case does not present a conflict or other issue of sufficient significance or generality to warrant the expenditure of this Court's resources that would be necessary to come to a decision on the merits. In addition, as set forth in detail in Sections II, III and IV below, Petitioner is clearly mistaken with respect to the specific legal infirmities he claims exist in the decision below.

II. THE COURT OF APPEALS' VIEW OF THE INTENT REQUIREMENT IN DISPARATE TREATMENT CASES IS CORRECT.

A. The Court Of Appeals Opinion Is Consistent With The Prior Opinions Of This Court On This Issue.

1. *The Court of Appeals opinion is not in conflict with Johnson Controls.*

Although DiBiase's position is not entirely clear from the Petition, he appears to argue that the Court of Appeals opinion conflicts with *UAW v. Johnson Controls, Inc.*, 449 U.S. 111 (1985), on the need for evidence of discriminatory intent in disparate treatment cases. *See* Pet. at 14-15. That argument, however, clearly has no merit. *Johnson Controls* found no need for independent evidence of discriminatory intent where a policy was *facially* discriminatory. In *Johnson Controls*, this Court said:

> [T]he absence of a malevolent motive does not convert a *facially* discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through *explicit facial discrimination* does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.

449 U.S. at 199 (emphasis added).

The Court of Appeals recognized that standard to apply to facially discriminatory policies. It quoted from the *Johnson Controls* passage just cited and explained its reasoning:

> [I]n a facial disparate treatment case, the protected trait by definition plays a role in the decisionmaking process, inasmuch as the policy explicitly classifies people on that basis. Thus, when the policy itself displays the unlawful categorization, the employee is relieevd from independently proving intent.

43 F.3d at 726.

However, in the instant case, the Court of Appeals found that SKB's policy was *not* facially discriminatory—

indeed, that it was an "archetypical example of a facially *non*-discriminatory policy". 43 F.3d at 727. The court explained that "[SKB] made the expanded package available to all persons willing to sign the release, regardless of age." *Id.* Therefore, the statement in *Johnson Controls* to the effect that discriminatory intent need not be shown separately where a policy is *facially* discriminatory was not directly apposite.

Thus, the opinion below is not in the least at odds with *Johnson Controls.*

2. ***This Court should not grant certiorari to review whether the Court of Apeals correctly applied the intent requirement in this case.***

a. *This issue was not raised in the Court of Appeals.*

DiBiase appears to argue for the first time in his Petition that a claim of *nonfacial* disparate treatment does not require evidence of an intention to discriminate. *See* Pet. at 14-18. In the District Court, DiBaise did not raise the issue and in the Court of Appeals, he expressly conceded that evidence of intent to discriminate was required to prevail on a nonfacial disparate treatment claim. In his appellate brief, he stated:

> If, arguendo, the [SKB policy] is not facially discriminatory, it still unlawfully discriminates against older workers. This follows since the only component that a finding of explicit facial discrimination adds is the removal of any requirement to prove there was intent to discriminate.

Brief of Plaintiff-Appellee at 16. As a consequence of DiBiase's concession, the Court of Appeals did not directly address this issue as critical for its decision. Having not been raised below, the issue is not appropriate for review in this Court. *See Delta Air Lines v. August,* 450 U.S. 346, 362 (1981) (stating that "a question presented in the peittion but not raised in the lower court of appeals is not properly before us").

b. *The Court of Appeals properly treated independent evidence of discriminatory intent as necessary for DiBiase's claim.*

To the extent that the Court of Appeals opinion may be read as *deciding* (rather than simply *assuming*) that evidence of discriminatory intent is necessary for a claim of nonfacial disparate treatment, it is wholly consistent with a long line of Supreme Court cases. The Court of Appeals stated that independent evidence of discriminatory intent is not necessary in *facial* disparate treatment cases, but is necessary in *non*facial disparate treatment cases. *See* 43 F.3d at 726-28. That is exactly what this Court has previously held.

Indeed, intent to discriminate must be shown in *all* disparate treatment cases: where the alleged discrimination is pursuant to a policy that discriminates on its face, that intent is apparent from the policy itself and no further evidence is necessary; where the alleged discrimination is not pursuant to such a policy, however, independent evidence of discriminatory motive is necessary. In *Hazen Paper Co. v. Biggins*, —— U.S. ——, 113 S. Ct. 1701 (1993), for example, this Court stated:

> Disparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristic.] Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . .

113 S.Ct. at 1705 (internal quotations and citations omitted).

In *Hazen Paper* itself, the plaintiff won a judgment against his employer for wrongful discharge under the ADEA, although there was no facially discriminatory policy involved. The Court of Appeals affirmed, largely

on the basis that the plaintiff had introduced evidence at trial that the employer had fired him in order to prevent his retirement benefits from vesting. This Court, however, reversed and remanded, holding that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age," even a factor—such as qualification for retirement benefits—that is correlated with age. *Id.* The Court explained:

> In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision. The employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with that trait. Or the employer may have been motivated by the protected trait on an ad hoc, informal basis. Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.

Id. at 1706 (citations omitted). Thus, *Hazen Paper* makes clear that an intention to discriminate is an essential element of a nonfacial disparate treatment claim. That is precisely the position of the Court of Appeals in this case.[1]

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[1] DiBiase also appears to argue that the Court of Appeals decision requires a plaintiff claiming nonfacial disparate treatment to adduce evidence that the defendant had actual knowledge that the practice at issue was illegal. *See* Pet. at 15 (including discussion of the *scienter* concept applicable to certain securities law violations). Nothing in the Court of Appeals opinion, however, suggests such a requirement. To the extent that the opinion below mentions the intent requirement at all, it is clear that the court is referring to the *intent to discriminate on the basis of age* and not to knowledge of illegality. *See* 48 F.3d at 728 & n.10 (noting that, in the absence of a facially discriminatory policy, DiBiase had to prove that SKB "intended to target older workers"). In so doing, the Court of Appeals correctly used the same notion of intent that is

B. Neither Precedent Nor Logic Supports Treating Notice of An Employee's Intention To File A Claim As Proving The Employer's Discriminatory Intent.

DiBiase asserts that, by telling SKB that he thought its policy treated older workers worse than younger workers, he placed SKB "on notice" of the discriminatory character of the policy. SKB's application of the policy despite such "notice", DiBiase argues, is sufficient proof of SKB's intent to discriminate. The Court of Appeals dismissed that argument in a footnote. *See* 43 F.3d at 728 n.10. DiBiase now contends that the Court of Appeals position is contrary to this Court's holding in *Johnson Controls*. *See* Pet. at 17-18. The fatal flaw of that contention is that it presumes a similarity between *Johnson Controls* and this case that does not exist.

In *Johnson Controls*, this Court considered a policy that, by its *explicit* terms, excluded females, but not males, from certain jobs. Given such explicit or "facial" discrimination, it was not necessary to introduce independent evidence of intent to discriminate according to gender: the words of the policy showed conclusively that the employer intended to discriminate on that basis. *See* 449 U.S. at 197. Here, there is no such explicit discrimination. The SKB policy does not, on its face, mandate that terminated employees are to be given different severance options according to their ages. Indeed, as the Court of Appeals found, the SKB policy mandates the same treatment for all and it is impossible to know, from the terms of the SKB policy itself, which workers might be better off and which worse off. *See* 43 F.3d at 727, 730. That critical difference between the policy at issue in *Johnson Controls* and the policy at issue here explains why there was no need to adduce independent evidence of discriminatory

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used by this Court in nonfacial disparate treatment cases. *See, e.g., Hazen Paper*, 113 S. Ct. at 1706 ("In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision.").

intent in *Johnson Controls*, while there was such a need here.

Furthermore, nothing in *Johnson Controls* or any other decision of this Court suggests that discriminatory intent may be proved merely by showing that the plaintiff expressed to the defendant his opinion that the defendant's policy was discriminatory. Neither DiBiase nor any other employee is presumptively infallible on the issue of whether an employment policy is discriminatory. And no employer need accept an employee's opinion on the matter as true and design and implement policies on the basis of that opinion. Indeed, in this case, DiBiase's opinion was found by the Court of Appeals to be wrong; despite his perhaps sincere feelings to the contrary, there was no showing that SKB's policy actually treated him less well than it treated younger employees.

Lack of precedent aside, DiBiase's argument should be rejected for its unfair and nonsensical consequences. As the Court of Appeals observed, DiBiase's position would allow any plaintiff to "manufacture" discriminatory intent simply by opining to the employer that its actions were discriminatory. 43 F.3d at 728 n.10.

III. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *MANHART*.

DiBiase also argues that, "by reasoning that the [SKB policy] was not age discriminatory", the Court of Appeals decision is in conflict with *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978). Pet. at 20. That argument fails, however, because the policy at issue in *Manhart*, by its explicit terms, treated members of the protected class adversely *vis a vis* nonmembers. In contrast, the SKB policy, by its explicit terms, treated all employees equally.

In *Manhart*, the policy at issue expressly required female workers to contribute to a pension plan at a higher rate than

male workers. It was manifest—on the face of the policy itself—that any female worker had to pay out more than any male worker.[2] Here, by contrast, every employee is treated equally by being given the same choice of severance options. Whether any particular terminated employee is better off or worse off under the SKB policy than any other depends upon a complex set of facts about his or her past experience at SKB. (Only a careful analysis of those facts will show how much any given worker gives up by signing a general release in exchange for the Enhanced Benefits Package.) As the Court of Appeals accurately observed:

> [SKB] conditioned the right to the expanded benefits on an employee's blanket waiver of all accrued claims; this treatment cannot be said to be disparate, because it is impossible to tell whose package of

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[2] A long line of this Court's decisions show that the hallmark of *facial* discrimination, such as that in *Manhart*, is an explicit classification of persons on the basis of a protected trait. *Dothard v. Rawlinson*, 433 U.S. 321 (1977), for example, concerned a challenge to two employment policies: one expressly prohibiting women from serving as counselors at certain correctional facilities, the other imposing height and weight requirements for prison guards. *See* 433 U.S. at 332. The Court held that only the first, because it contained an *explicit* gender classification, could be *facially* discriminatory; the second, because it contained no such classification, was "facially neutral". *Id.* at 320.

The cases following *Dothard* that this Court has treated as facial discrimination cases reveal that hallmark. *See Manhart*, 435 U.S. 702, 711, 715 (1978) (concerning a practice that explicitly required women to contribute more than men to a pension program); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (concerning a policy expressly allowing only pilots under 60 to "bump" flight engineers); *Johnson Controls*, 449 U.S. 187, 197 (1991) (concerning policy that explicitly prevented fertile women, but not fertile men, from being placed in certain jobs).

The SKB policy at issue here contains no explicit instruction that older workers be treated differently; in fact, it expressly mandates that all employees be treated the same. Thus, this case is manifestly unlike the facial discrimination cases cited above.

> potential claims is more valuable. Therefore, in light of the above, DiBiase has no disparate treatment claim against [SKB].

43 F.3d at 730 (footnote omitted).

Manhart and this case are polar opposites: whereas the *Manhart* policy explicitly classified employees according to a protected trait (gender) and treated one group (women) adversely, the SKB policy contains no explicit classification and treats all employees the same. Hence, *Manhart* cannot control the disposition of this case and the Court of Appeals decision cannot be said to be in conflict with *Manhart*.

IV. THE COURT OF APPEALS DECISION DID NOT VIOLATE ANY CONGRESSIONAL MANDATE WITH RESPECT TO THE ADEA.

Finally, DiBiase argues that the Court of Appeals decision violates a Congressional mandate with respect to the ADEA. *See* Pet. at 23-24. That argument, however, wrongly assumes that the Older Workers Benefit Protection Act ("OWBPA") prohibits employers from offering older and younger workers equally the option of receiving enhanced severance benefits in exchange for a general release of all claims against the employer.

A principal feature of OWBPA is its specification of certain conditions that must exist in order for waivers of ADEA claims to be considered valid. *See* 29 U.S.C.A. § 626(f). By legislating such conditions, Congress made clear that neither ADEA waivers nor employer requests for such waivers are, in principle, unlawful. In addition, the legislative history of OWBPA shows that Congress did not find policies such as SKB's to be objectionable.

In enacting OWBPA, Congress focused on the practice of requesting waivers of ADEA claims and on the consideration to be paid for such waivers. Indeed, Congress focused specifically on the practice at issue here: exchanging enhanced severance benefits for a general re-

lease of all claims. The Senate Report on OWBPA expresses Congress' broad concern with ADEA waivers by, among other things, referring explicitly to two judicial decisions, *Cirillo v. ARCO Chemical Co.*, 862 F.2d 448 (3d Cir. 1988), and *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir.), *cert. denied*, 482 U.S. 928 (1987). *See* 5 1990 U.S.C.C.A.N. 1509, 1537. Both cases involved ADEA waivers made as part of general releases. While the Senate Report focused on how those decisions analyzed the validity of the waivers (and expressed a preference for the *Cirillo* approach), it revealed absolutely no discomfort with the practice of providing *all* employees with the same consideration for a general release of all claims.

Moreover, the legislative history of OWBPA contains evidence that Congress considered—and rejected—a requirement that extra consideration be paid for general releases that included ADEA claims. Early in the legislative term in which OWBPA was passed, the Senate and House of Representatives considered two other bills regulating ADEA waivers. Both of those bills required that:

> the rights or claims are waived in exchange for consideration in addition to anything of value
>
> > (i) to which the individual already is entitled; or
> >
> > (ii) that has been offered to a group or class of individuals under an early retirement incentive or other employment termination program[.]

S. 54, 101st Cong., 1st Sess., 135 Cong. Rec. 5168 (Daily Ed. Jan. 25, 1989); H.R. 1432, 101st Cong., 1st Sess., 135 Cong. Rec. H697 (Daily Ed. Mar. 15, 1989).

The second of those alternative tests would have required employers to provide extra consideration—above what they offered generally in their severance program—to employees waiving ADEA claims, which is essentially

what DiBiase demands here. Neither of those bills was enacted.

Later in the session, Congress returned to the ADEA waiver issue and drafted new provisions, "represent[ing] a change from the approach" of the earlier bills. S. Rep. No. 263, 101st Cong., 2d Sess. 31 (1990). Among the most significant departures from the earlier bills was the absence of the requirement for consideration beyond that offered in group severance programs. On the subject of consideration, the new bill simply stated that waivers must be made

> only in exchange for consideration in addition to anything of value to which the individual already is entitled[.]

29 U.S.C.A. § 626(f)(10)(D). *That* language, not the language of the earlier bills, was enacted and became part of the ADEA. Thus, Congress chose to reject the extra consideration requirement.

In sum, there is no provision in OWBPA prohibiting a practice such as SKB's, which offers all employees equally the option of enhanced benefits in exchange for a general release of all claims. In fact, the legislative history suggests that Congress not only accepted or acquiesced in such practices, but also deliberately refused to alter them in the way DiBiase proposes. In rejecting DiBiase's proposal, the Court of Appeals acted consistently with Congressional intent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 18, 1995